IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

ARBITRATION APPEAL NO.1 OF 2003

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Municipal Corporation of the
City of Pune ...Appellant

v/s.

Bombay Cable Car Co.Pvt.Ltd. ...Respondent

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Shri Rohit Kapadia, Sr.Counsel with Mr.V.G.Mujumdar for the Appellant.

Mr.V.R.Manohar, Sr.Counsel with Ms.Usha Purohit i/b Shah, Desai, Doijode & Phatarphekar for the Respondent.

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CORAM: D.K.DESHMUKH, J.

DATED: 3RD MARCH,2005

ORAL JUDGMENT:

1. By this Appeal, the Appellant challenges the judgment dated 5th August, 2000 passed by the 3rd Extra Joint District Judge, Pune in Misc.Application No.586 of 1998.

2. The facts that are material and relevant for deciding this petition are that the Petitioner/Pune Municipal Corporation had entered into a contract with the Respondent. The dispute arose between the parties. The agreement had an arbitration clause. On 1st October, 1996 the Respondent issued a notice styling it as notice under Section 9 of the Arbitration Act, 1940. The arbitration clause was invoked and the Hon'ble Mr.Justice M.L. Pendse (retd.) was appointed as the sole arbitrator. It was stated that if the Petitioner desires to appoint an

arbitrator of their own then they shall do so within 15 days and it was also stated that if they fail to appoint their own arbitrator, the arbitrator appointed by the Respondent shall be the sole arbitrator, and he will proceed with the matter. Another notice was issued on 8-11-1996 by the Respondent stating therein that as the Arbitration Act, 1996 had already come into force, the notice dated 1st October, 1996 should be taken to be a notice under Section 10 of the new Act and therefore the Petitioner had 30 days to communicate the name of its arbitrator. It was stated that since the period of 30 days came to an end on 5-10-1996, in the absence of any communication from the Petitioner, now the arbitrator appointed by the Respondent shall act as the sole arbitrator. It appears that the sole arbitrator issued a notice dated 10th December, 1996 to the Petitioner/corporation stating therein that the arbitration proceeding will commence from 24-12-1996. The Petitioner/corporation addressed a letter dated 23rd December, 1996 to the learned Arbitrator stating therein that the Petitioner/Corporation is considering the question of appointing an independent arbitrator on behalf of the Corporation or to accept the appointment of

Mr.Justice Pendse (retd.) as the sole arbitrator and therefore, two months time was sought from the learned arbitrator. The learned Arbitrator did not grant two months time, but he granted only two weeks time. There was no further communication from the Petitioner/corporation in this regard. Ultimately in the arbitration proceedings an objection was raised to the jurisdiction of the sole-arbitrator. The objection was that the appointment of the sole arbitrator is not in accordance with the provisions of 1996 Act. That objection was decided by the learned Arbitrator by his order dated 3rd September, 1997. The learned Arbitrator rejected the objection. The learned Arbitrator, thereafter, proceeded with the matter and made the final award. The award was challenged under Section 34 of the Act. The Application was registered as Misc.Application No.586 of 1998. The learned 3rd Extra Joint District Judge, as observed above, decided the petition by order dated 5th August, 2000. The learned District Judge upheld the ruling of the learned Arbitrator on the question of jurisdiction.

3. The learned Counsel appearing for the Petitioner submits that the arbitration clause between the

parties does not provide for number of arbitrator and therefore, in terms of the provisions of sub-section 2 of Section 10 of the Act, it is obvious that the appointment can be of the sole arbitrator. The learned Counsel submits that there was no agreement between the parties agreeing on the procedure of appointment of the arbitrator and therefore, in terms of sub-section 5 of Section 11, a notice could have been given by the Respondent to the Petitioner communicating the name of the person to be appointed as the sole arbitrator. After the Petitioner/Corporation fails to agree to that name, then the power to make the appointment will pass on to the Hon'ble Chief Justice of this Court and therefore, only the sole arbitrator appointed by the Chief Justice could get the jurisdiction to make the award. The learned Counsel appearing for the Petitioner submits that the observations in the order of the learned arbitrator that 30 days' time limit provided by sub-section 5 of Section 11 is applicable only in relation to the agreement on procedure for appointment of the arbitrator is absolutely wrong. According to the learned Counsel on expiry of the period of 30 days from the date of notice both the parties lost their power to make the appointment of

the arbitrator, only authority competent to make the appointment becomes the Chief Justice in terms of section 11. It is further submitted that the letter written by the Corporation to the learned Arbitrator cannot be termed either as a waiver or any agreement by the Corporation to the name of the sole arbitrator.

4. The learned Counsel appearing for the Respondent, on the other hand, submits that Section 10(1) provides for the party being free to determine the number of arbitrators. By clause 30 of the agreement number of arbitrator is not decided and therefore in terms of provisions of sub-section 2 of Section 10, there could be only sole arbitrator, and therefore, according to the learned Counsel the provision of Section 11 of the Arbitration Act is not attracted, because Section 11(2) of the Act deals with the procedure to appoint the arbitrator or arbitrators. It is submitted that sub-section 5 of Section 11 deals with an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days, then the appointment of the arbitrator can be made only by the Chief Justice. According to the learned Counsel, Section 11(5) provides for

failure to agree to the procedure for appointing the arbitrator and the failure to be communicated within 30 days, that the Chief Justice comes on the scene for being approached for the nomination of the arbitrator. It is submitted that as a matter of fact the Petitioner by its letter dated 23rd December, 1996 and the subsequent conduct of participating in the arbitration proceedings agreed for the sole arbitration of Mr.Justice Pendse (Retd.)

5. Now, in order to appreciate the rival submissions, it is necessary to first go to the arbitration clause. The arbitration clause which is relevant for the present purpose reads as under:-

> 30. Matters pertaining to the lease of land will be determined solely under the authority of the Municipal Commissioner and his decision shall be final. However, disputes if any pertaining to the scheme/project shall be settled by Arbitrators as per the Arbitration Act, 1940 as amended from time to time, shall apply.

Perusal of the above quoted clause 30 shows that parties have not agreed on number of arbitrators, therefore, Section 10 of the Act becomes relevant. Section 10 reads as under:

> 10(1) The parties are free to determine the number of arbitrators, provided that such number shall not be an even number.
>
> (2) Failing the determination referred to in sub-section (1), the arbitral tribunal shall consist of a sole arbitrator.

Perusal of Section 10 shows that if the parties have not determined the number of arbitrators then Section 10 mandates that arbitration shall be by the sole arbitrator. Sub-section 2 of Section 11 lays down that parties are free to agree on a procedure for appointment of the arbitrator or arbitrators. Thus, an option is given to the parties to agree on the procedure for appointment of arbitrator. Sub-section 5 of Section 11 reads as under:

> 11(5) Failing any agreement referred to in

> sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be, made, upon request of a party, by the Chief Justice or any person or institution designated by him.

Sub-section 5 of Section 11 is attracted if there is no agreement between the parties agreeing on the procedure for appointment of the arbitrator. Perusal of arbitration clause quoted above shows that it does not show that there was any agreement between the parties on the procedure for appointment of the arbitrator. It is nobody's case that when the letter dated 1st October, 1996 was issued, there was any agreement between the parties on procedure for appointment of the arbitrator. Perusal of the letter dated 1st October, 1996 shows that the basic assumption on which this letter was issued itself was wrong. The letter dated 1st October, 1996 was issued on the assumption that the provisions of 1940 Act are applicable, when really that Act was already

repealed and provisions of 1996 Act were applicable. The consequence of provisions of 1996 Act coming into force was that in terms of provisions of sub-section (2) of Section 10, it was mandatory that the arbitration would be by the sole arbitrator. Therefore, really speaking a notice should have been issued by the Respondent to the Petitioner suggesting the name of the sole arbitrator and calling upon the Petitioner to agree to the name suggested by the Respondent. Relevant portion of the letter dated 1st October, 1996 reads as under:-

> "My clients hereby appoint Shri M.L. Pendse, Former Justice, High Court, Bombay and Chief Justice of Karnataka High Court as their Arbitrator. If you intend to appoint an Arbitrator for yourself too, you may do so within 15 days of the receipts of this notice.

6. Now, in the facts and circumstances of this case, this notice cannot be taken to be the notice issued under the provisions of 1996 Act and an attempt appears to have been made to correct this

notice by issuing another notice dated 8-11-1996. Relevant portion of this letter reads as under:-

> "You received the notice on 5-10-1996, of which I have the acknowledgement. My clients had appointed Shri M.L.Pendse Retired Chief Justice Karnataka High Court as their Arbitrator.
>
> Since a period of 30 days has come to an end on 5-10-1996 in the absence of any communication from you, my clients shall proceed before the learned Arbitrator as the Sole Arbitrator."

It is clear from what is quoted above that according to the Respondent as the Petitioner has not communicated anything to the Respondent within a period of 30 days from 5-10-1996, Shri Justice Pendse gets appointed as the sole arbitrator. Perusal of sub-section (5) of Section 11 shows that the requirements of sub-section (5) of Section 11 are that (1) one party suggests the name of the sole arbitrator to the other party; (2) calls upon the

other party to agree to that appointment and (3) the other party is allowed 30 days time to agree to the suggestion. A person can get appointed as a sole arbitrator by agreement of the parties, only if all these conditions are satisfied. Perusal of the notices dated 1st October, 1996 and 8th November, 1996 show that there was no notice issued calling upon the Petitioner to agree to the appointment of Justice Shri Pendse (Retd.) as the sole arbitrator. What the Petitioner was called upon to do was to appoint his own nominee and the Petitioner was told that if the Petitioner fails to appoint his own nominee, Justice Shri Pendse (retd.) will become the sole arbitrator, 30 days time was also not allowed. Thus, there was no notice issued in this case under sub-section 5 of Section 11. Under the scheme of the Act, an arbitrator can be appointed by the parties or by entering into an agreement amongst themselves by following the procedure laid down by Section 11. But it appears that the appointment of Justice Shri Pendse (Retd.) as the arbitrator was brought about not by any agreement between the parties. The procedure laid down by Section 11(5) of the Act for the parties to arrive at an agreement on the name of the sole arbitrator was not at all

followed.

7. It is further to be seen that even if it is assumed that notices dated 1st October, 1996 and 8th November, 1996 are to be taken as notices issued under sub-section 5 of section 11, then also if the Petitioner did not positively agree to the appointment of Justice Shri Pendse (Retd.) as an arbitration within 30 days, in my opinion, the parties will lose their power to agree on appointment of the arbitrator and that power will get vested on expiry of period of 30 days in the Chief Justice of this court or a nominee of the Chief Justice. The parties, thereafter, will have no power even to agree on the name of the sole arbitrator. Even if the parties agreed subsequently, after expiry of the period of 30 days, to the name of any arbitrator, they will have to approach the Chief Justice for appointment of the sole arbitrator. A valid appointment of sole arbitrator can be made by an agreement of the parties within a period of 30 days from the date of issuance of the notice by one party to the other suggesting the name of the sole arbitrator. If the parties fail to arrive at an agreement within 30

days of the notice, then they lose power to appoint the sole arbitrator and that power gets vested in the Chief Justice. As within 30 days from the letter dated 1-10/1996 the parties did not reach an agreement on the appointment of Shri Pendse as an arbitrator, the Petitioner lost its right/power to agree to the appointment of Shri Pendse as an arbitrator, therefore, there is no question of the Petitioner agreeing to the appointment by letter dated 23-12-1996. It is clear from the provisions of sub-section 5 of Section 11 that an agreement on the name of the sole arbitrator can be reached by the parties only within a period of 30 days from the date of notice and not subsequently. It was submitted on behalf of the Petitioner that failure of the other party to reply to the communication issued under Sub-section 5 of Section 11 will also bring about an agreement. However, in my opinion, submission is not well founded. What is contemplated by sub-section (5) of Section 11 is an express agreement and it does not contemplate an agreement coming about by one of the parties failing to reply. Perusal of Section 16 shows that conduct of the Petitioner of participating in the proceedings, depositing arbitration fees will also

not amount to waiver, because sub-section 2 of Section 16 enables a party who himself has made appointment of the arbitrator to object to the appointment of the same person as an arbitrator, provided the objection to the jurisdiction is raised not later than the submission of the statement of defence. In terms of the provisions of the Act, an appointment of the sole arbitrator can be made by an agreement of the parties by one party issuing notice to the other party suggesting the name of the person who it wants to be appointed as an arbitrator and giving other party 30 days time to consider the proposal. In the present case there is no notice issued by either party which complies with the requirements of Section 11(5) of the Act. Issuance of a notice which complies with the requirements of Section 11(5) is a condition precedent for bringing about a valid appointment of a sole arbitrator by agreement of the parties. Therefore, as both notices issued by the Respondent do not comply with the provisions of Section 11(5) of the Act, the appointment of Shri Pendse as an arbitrator can not be said to be valid.

8. It was contended on behalf of the Petitioner

that sub-section 2 of Section 11 empowers the parties to agree to a procedure for appointment of the arbitrator. It inheres this power in the party not to agree to any procedure. No fault can be found with this submission. The Legislature contemplates the parties not agreeing on any procedure for appointment of the arbitrator and therefore sub-section 5 makes a provision to meet such a situation in so far as the appointment of the sole arbitrator is concerned. Perusal of the award of the learned arbitrator shows that the learned arbitrator has misinterpreted the provisions of sub-section 5 of Section 11, in as much as, the learned arbitrator has observed that failure contemplated by sub-section 5 of Section 11 is failure to agree on the procedure for appointment of the arbitrator. In my opinion, sub-section 5 of Section 11 operates on two things; (i) absence of agreement on procedure for appointment of the arbitrator and (ii) failure of the parties to reach the agreement within 30 days of one party giving notice to the other party. The scheme of Section 11(5) is that if there is no agreement between the parties in relation to the procedure that is to be followed in the matter of appointment of the

arbitrator, then either parties make appointment within 30 days of one party issuing notice by agreement, otherwise the power to make the appointment passes on to the Chief Justice and once the power gets vested in the Chief Justice , parties by conduct or agreement cannot divest the Chief Justice of that power. In the present case, admittedly, the appointment of the sole arbitrator is not made by the Chief Justice, therefore, the sole arbitrator who made the award had no jurisdiction to make the award. The award of the learned arbitrator, therefore, rejecting the objection to the jurisdiction of the arbitrator, therefore, is liable to be set aside. Similarly, the order passed by the 3rd Extra Joint District Judge impugned in the petition is also liable to be set aside.

9. In the result, therefore, the present Appeal succeeds and is allowed. The award of the learned arbitrator and the order of the 3rd Extra Joint District Judge impugned in the petition dated 5th August, 2000 are set aside. The Respondent is directed to pay costs of the petition as incurred by the Petitioner to the Petitioner.

At the request of the learned Counsel appearing for the Respondent, it is directed that operation of this order shall remain stayed for a period of eight weeks from today. However, during this period the Respondent shall keep the bank guarantee current.

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